No. 82-1287

IN THE

Supreme Court of the United States

October Term, 1982

RANDOLPH ASSOCIATES, a partnership composed of Howard Bass, Lawrence Berger, Clayton Holding Co., a New Jersey corporation, Steven Rachlin, SBS Associates, Ltd., a partnership, and Howard Wachtel,

Petitioner,

vs.

WAKEFERN FOOD CORP., VILLAGE SUPER MARKET, INC., DOMINICK ROMANO, and RONETCO, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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Question Presented

Should the Supreme Court review the dismissal of a treble damage antitrust suit where: (1) the district court found that plaintiff's alleged harm was totally independent of the asserted antitrust violation; and (2) the courts below adhered to a consistent line of authority, recently reaffirmed by this Court, in dismissing for lack of standing a case in which (a) plaintiff admittedly did not participate in the market in which competition allegedly was threatened by the purported violation, (b) plaintiff's alleged injury resulted only derivatively from the effect of the alleged violation upon a party with which plaintiff had entered into a contract, and (c) plaintiff's asserted injury did not flow from that which would make the alleged violation unlawful?

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Statement of the Case

This case involves the alleged breach of a lease agreement, and the damages which the plaintiff/petitioner Randolph Associates ("Randolph") claims to have suffered as a result of that breach. As such, petitioner has concurrently commenced a breach of contract suit in New Jersey

state court. *Randolph Associates* v. *Wakefern Food Corp., et al.*, No. L-062666-81 (Superior Ct., Essex Co.). However, like numerous unsuccessful plaintiffs in the federal courts, petitioner has also attempted to transmute its prosaic state contract claim into a golden, treble damage antitrust windfall. Thwarted unanimously below, petitioner offers this Court no reason why it should hear this case. Nor could there be any such reason, when: (1) as the subject lease makes clear, and as the district court found, any injury petitioner may have suffered was wholly unrelated to the purported federal antitrust violation; and (2) the courts below adhered to long-established and consistent authority, recently reaffirmed by this Court, in dismissing the Complaint.

The Parties

Petitioner is a commercial real estate developer in New Jersey (P. App. D at 13a).[1] Defendants-respondents Villarge Super Market, Inc. ("Village") and Ronetco, Inc. ("Ronetco") own and operate supermarkets (directly or indirectly) under the "ShopRite" name. (P. App. D at 13a-14a). Defendant-respondent Dominick Romano is a shareholder of Ronetco and/or subsidiaries thereof. (Ronetco Answer ¶ 9). Wakefern Food Corp. ("Wakefern") is a corporation operated under a cooperative plan, which provides

1. References to the instant Petition for a Writ of Certiorari are denoted as "Pet. at —." References to the Appendices to the Petition are denoted as "P. App. — at —." Petitioner's Complaint appears at pages 4 through 9 of the Joint Appendix submitted to the Court of Appeals for the Third Circuit ("Jt. App."). References to the answer of a party are denoted as "—— Answer ¶ —." The answers of the defendants appear at pages 109-125 of the Joint Appendix.

certain services to its shareholders with regard to the operation of "ShopRite" supermarkets. (Wakefern Answer ¶ 3).

The Complaint

Petitioner alleged that on or about August 6, 1973, its predecessor-in-interest entered into a written lease agreement (the "Lease") with Village for the construction and lease to Village of a building and store space in a proposed shopping center and contiguous office building. (P. App. D at 13a). Petitioner further asserted that Village subsequently "informed plaintiff of its refusal to perform the aforesaid lease, thus anticipatorily breaching its lease agreement with plaintiff" and damaging petitioner. (Complaint ¶ 19).

Lured by the prospects and coercive effects of the treble damage provision of Section 4 of the Clayton Act, petitioner then sought to force its claimed contractual harm into an antitrust mold, even though, by petitioner's own admission, the alleged antitrust violation restrained trade only in a business (the retail supermarket business) in which petitioner does not operate. Thus, petitioner alleged that: (1) the subject premises were "to be operated . . . as a supermarket under the name of 'ShopRite' " under license from Wakefern, a supermarket cooperative association (P. App. D at 13a; Complaint ¶¶ 7, 12); and (2) Wakefern denied Village a license to operate a "ShopRite" supermarket on the subject premises as the result of an agreement between Wakefern and its members, "the effect of [which agreement] is to implement, maintain and enforce an unlawful horizontal division of markets by and among defendants in

restraint of trade . . . in the *retail supermarket business.*" (P. App. D at 14a; Complaint ¶ 16). (Emphasis supplied.)[2]

The Lease

Not only did the Complaint demonstrate that any alleged antitrust violation did not relate to a business in which petitioner operated, but it also made clear that the contractual harm claimed by petitioner was totally independent of any such violation. In paragraph 29 of its Complaint, petitioner admitted that Village's performance under the Lease was not conditioned upon Village's obtaining approval to operate a ShopRite supermarket on the subject premises. And, the Lease, a 36-page integrated contract, clearly and unambiguously provides that Village could use the leased premises for *any* lawful purpose:

> "4. *Use of Leased Premises*: The leased premises shall be used for all lawful purposes including the conduct of a supermarket for the retail sale of food, drugs, and such non-food items as are sold in supermarkets in the Metropolitan New York area . . . ."

Furthermore, Village was free to assign or sublet the premises to any tenant for any lawful purpose:

> "4. *Use of Leased Premises* . . . .
>
> (a) Tenant may assign this lease or sublease the demised premises or any portion thereof to be used for any lawful purpose . . . ."

* * *

2. Petitioner also brought the same state law claims that it raised in its action in the New Jersey courts. Upon the dismissal of the antitrust claim, the state claims were also dismissed in this case for lack of federal jurisdiction. (P. App. B at 10a). However, those state law claims—which are the essence of the dispute between the parties—are still pending before the New Jersey state courts.

> "39. *Assignment and Subletting*: Tenant may sublet all or any part of the Demised Premises, or license the use of any portion thereof, or assign this lease, but Tenant shall nevertheless continue to remain liable hereunder. . . ."

In short, the Lease did not contain any requirement that Village operate a ShopRite supermarket, nor did it condition the performance of either party upon Village's obtaining approval for a ShopRite store. Thus, the grant of, or the refusal to grant, a license by Wakefern had no bearing on the obligations of the parties to perform under the Lease.[3]

Proceedings Below

After initially denying defendants' motion to dismiss the antitrust claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6),[4] the district court granted defendants' motion to reargue. On that motion, the court found—after a hearing—that petitioner's claimed damage was not related to the alleged antitrust violation, and, therefore, dismissed the Complaint:

> "The lease . . . is clear and unambiguous. . . . *The lease did not require that the premises be operated as a ShopRite supermarket.*" (P. App. B at 6a-7a). (Emphasis supplied.)

* * *

3. Despite petitioner's contention to the contrary (Pet. at 5), defendants obviously did not concede that Village's alleged breach of the Lease resulted from the purported antitrust violation.

4. The district court initially held that defendants' motion should be considered as one for summary judgment under Fed. R. Civ. P. 56, because defendants annexed a copy of the Lease as an exhibit to their motion. (P. App. C at 16a).

> "[T]he lease [permits] defendant to use the premises for any lawful purpose; therefore, *the parties could have performed under the lease even if there was an antitrust violation* . . . [I]t necessarily follows that, as a matter of law, there was no injury to plaintiff from the alleged antitrust violation. *Plaintiff may have been injured by a breach of contract by defendants, but it clearly was not affected, as a matter of law, by defendants' alleged antitrust violations.*" (P. App. B at 8a). (Emphasis supplied.)[5]

In addition, the district court dismissed the Complaint on the grounds that, regardless of the requirements of the Lease, petitioner lacked standing because its alleged injury: (1) was too remote from the alleged unlawful conduct; and (2) did not reflect the anticompetitive impact of the claimed violation:

> "[P]laintiff lacks the requisite standing under section 4 of the Clayton Act. The alleged antitrust violation

5. Because, as the district court found, the terms of the Lease were "jointly drafted and prepared by plaintiff and Village," and are "clear and unambiguous" (P. App. B at 6a), the Lease was able to "speak for itself." It is well settled in the State of New Jersey that parol evidence may not be considered to vary or contradict the unambiguous express terms of a written agreement. *E.g., Palmiere* v. *Forte*, 56 N.J. 155, 265 A.2d 539, 543 (1970); *Central Hanover Bank & Trust Co.* v. *Herbert*, 1 N.J. 426, 64 A.2d 75, 76 (1949). Specifically, parol evidence may not be considered to vary the effect of a use restriction in a real estate lease. *61-69 Pierrepont Street* v. *Feist*, 124 N.J.L. 412, 11 A.2d 727, 729 (1940); *Loria's Garage, Inc.* v. *L.E. Smith*, 49 N.J. Super. 242, 139 A.2d 430, 433 (App. Div. 1958).

Nevertheless, the district court held an evidentiary hearing at which it permitted petitioner to introduce extrinsic evidence as to the meaning of the Lease. However, far from contradicting the terms of the Lease, the documentary evidence and testimony presented by petitioner confirmed that the Lease did not require, and was not conditioned upon, the construction and operation of a ShopRite supermarket (P. App. B at 6a). Indeed, one of plaintiff's principals, a sophisticated real estate attorney, admitted in his testimony in open court that the Lease did not require that a ShopRite be built on the premises. (Jt. App. at 204).

is a conspiracy to implement, maintain and enforce an unlawful horizontal division of markets in restraint of trade in the retail supermarket business. *The industry in which the alleged antitrust violation exists is the retail supermarket business, not the shopping center development industry.*

"Plaintiff is a shopping-center developer and is not in the retail supermarket business, nor is it a competitor of defendants. Rather, plaintiff is Village's lessor and their relationship is grounded in contract . . . . Due to the nature of the relationship between plaintiff and the defendants, I find that *any alleged injury is too remote and indirect to warrant relief under the antitrust laws.*" (P. App. B at 8a). (Emphasis supplied.)

* * *

"A further justification for dismissing the complaint is plaintiff's failure to establish that it has suffered antitrust injury. . . . Plaintiff's alleged injury may be causally linked to the alleged antitrust violation, but it is not an antitrust injury. *The alleged injury is purely contractual—it simply involves the alleged breach of a lease and does not reflect the anticompetitive effect of defendants' alleged antitrust violation. . . .*" (P. App. B at 9a). (Emphasis supplied.)

By judgment order dated October 26, 1982 (P. App. A), the Court of Appeals for the Third Circuit unanimously affirmed the district court's order dismissing petitioner's thinly disguised breach of contract claims. In so doing, the Court of Appeals adhered to clear and longstanding authority.

REASONS FOR DENYING THE PETITION

Summary of Argument

This Court will grant review on a writ of *certiorari* "only when there are special and important reasons therefor," such as when the decision presents a conflict with the circuit courts, a conflict with prior decisions of this Court, or "an important question of federal law which ha[s] not been, but should be settled by this Court" (Rule 17, Supreme Court Rules). Because no such reason is present herein,[6] the Court should deny the instant petition.

First, given the plain meaning of the Lease, this action may be disposed of without reaching any federal legal issue at all. As the district court found, the alleged antitrust violation in no way affected the obligations of the parties to perform under the Lease, and therefore was entirely unrelated to petitioner's asserted harm. Petitioner must therefore rely upon its state court breach of contract action for any remedy. (Point I).

Additionally, in dismissing the Complaint, the courts below applied well established doctrine with regard to antitrust standing, and this Court's recent decision in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 51 U.S.L.W. 4139 (February 22, 1983), disposed of any question as to the correctness of their judgments. Because petitioner was not a participant in the market allegedly restrained by the purported violation, and because petitioner's alleged injury flowed only

6. Indeed, petitioner does not specify any "special and important reasons," but rather submits a brief on the merits.

derivatively from the claimed breach of contract, petitioner cannot satisfy the requirements for treble damage antitrust standing. (Point II).

I.

BECAUSE THERE IS NO QUESTION THAT PETITIONER'S ALLEGED INJURY WAS UNRELATED TO THE CLAIMED ANTITRUST VIOLATION, THERE IS NO ISSUE WARRANTING REVIEW BY THIS COURT.

Despite petitioner's use of antitrust terminology, it simply has been unable to state anything more than a contract claim. As the district court specifically found:[7] petitioner's injuries, if any, stem solely from the alleged breach of contract by Village; and, because the Lease allowed Village to use the leased premises for any lawful purpose, those alleged contractual injuries are wholly independent of the purported antitrust violation.

As a result, this claim raises no federal legal issue at all, and petitioner's remedy, if any, is one solely in its state court action for breach of contract. *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981), *cert. denied*, 454 U.S. 893 (1981); *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073, 1075 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

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7. Significantly, petitioner does not even challenge the district court's findings under Fed. R. Civ. P. 52(a).

II.

THE JUDGMENT BELOW IS FULLY CONSISTENT WITH THE DECISION OF THIS COURT IN *ASSOCIATED GENERAL CONTRACTORS* AND A LONG LINE OF AUTHORITY MANDATING DISMISSAL OF PETITIONER'S CLAIM.

This Court has consistently recognized that, in enacting Section 4 of the Clayton Act, 15 U.S.C. § 15, "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters, supra,* 51 U.S.L.W. at 4143. Although an antitrust violation "may be expected to cause ripples of harm through the . . . economy . . . Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action." *Id.* at 4143-44. Even apart from the lack of any relationship between petitioner's alleged injury and the claimed antitrust violation, the asserted harm to petitioner herein—a participant in the real estate market—was far too indirect and remote from the alleged impact of the asserted violation—on the retail supermarket business—to allow treble damage antitrust standing under Section 4.

A. The Courts Below Applied Wholly Correct Standards in Finding That the Alleged Injury to Petitioner Was Too Remote from the Purported Antitrust Violation to Allow Petitioner Antitrust Standing.

In *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters, supra,* two trade unions sued a multi-employer bargaining association and

its construction contractor members for treble damages under the antitrust laws. The unions claimed that the defendants had coerced certain users of construction services (*e.g.*, landowners and general contractors) to enter into business relationships with nonunion firms. Reversing the decision of the Ninth Circuit, the Court held that the unions lacked standing to sue under Section 4.

In particular, the Court held that the purpose of Section 4 is to protect the economic freedom of participants in the market restrained by the challenged conduct. *Id.* at 4144. *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977). And while the unions' claims related to an alleged restraint in the market for construction contracting and subcontracting, plaintiffs were neither consumers nor competitors in that market; they were involved only in the labor market. 51 U.S.L.W. at 4141-42 and n.14, 4144-45 and n.44.

Additionally, the Court emphasized the indirect or derivative nature of plaintiffs' asserted injury, *i.e.*, that plaintiffs were harmed only by virtue of the effect of the alleged restraint upon third parties with which the unions had hoped to deal. *Id.* at 4145. Accordingly, the Court dismissed the complaint for lack of standing.

The dismissal of the Complaint in the instant action fits squarely within the scope of the *Associated General Contractors* decision. By its own admission, petitioner is not involved in the market which it contends was affected by the alleged violation, *viz.*, "the retail supermarket business." (Complaint ¶ 16). The asserted effect of "higher prices and . . . poorer service . . . in the retail supermarket

business" has no economic nexus with the shopping center/office development business in which petitioner is involved.

Furthermore, like the plaintiffs in *Associated General Contractors,* petitioner herein did not suffer any direct restraint. Rather, the effect on petitioner was, at most, merely derivative of any impact of the alleged violation on its prospective tenant, and indeed, was wholly unrelated to the alleged violation.

Not only is the dismissal of the Complaint herein fully consistent with this Court's decision in *Associated General Contractors,*[8] but the judgments below adhered to long-standing precedent denying antitrust standing to persons not "in the area of the economy threatened by the alleged anticompetitive acts." *Cromar Co.* v. *Nuclear Materials & Equipment Corp.,* 543 F.2d 501, 508 (3d Cir. 1976).[9] In particular, the decisions below followed a long line of authority denying antitrust standing to a plaintiff whose alleged injury was derived from a contractual or other relationship with a person who is affected by an alleged

8. Petitioner relies heavily on the decision in *Blue Shield of Virginia* v. *McCready,* 102 S. Ct. 2540 (1982). As was explained in the subsequent *Associated General Contractors* decision, however, plaintiff in *Blue Shield* was in a very different position from that of petitioner herein. 51 U.S.L.W. at 4142 n.19, 4144-45 and n.44. First, of course, Mrs. McCready's injury was related to the antitrust violation of which she complained. *See* Point I, *supra.* Additionally, as a consumer of psychotherapeutic services, she was a participant in the very market that was the subject of the alleged restraint. 102 S. Ct. at 2549. Finally, she was the direct victim of the alleged conspiracy; indeed, her injury was "inextricably intertwined" with the alleged violation. *Id.* at 2551.

9. *See, e.g., Bogus* v. *American Speech & Hearing Ass'n,* 582 F.2d 277, 286 (3d Cir. 1978); *Brawman* v. *Bassett Furniture Industries, Inc.,* 552 F.2d 90, 99 (3d Cir.), *cert. denied,* 424 U.S. 823 (1977).

antitrust violation in his market and is thereby prevented from, or hindered in, performing his contract with plaintiff.

This analysis applies specifically to a landlord, such as petitioner herein, who complains of an antitrust violation affecting its tenant's market and therefore its tenant's ability to perform under its lease.[10] It applies as well to a franchisor who complains of antitrust violations affecting its franchisee's business, thereby causing a decrease in royalty payments;[11] a patent licensor who complains of loss of royalty income due to alleged antitrust violations affecting its licensee;[12] a vendor who complains of lost sales resulting from antitrust violations affecting the business of its customer;[13] and a shareholder or creditor who sues for losses in the value of his investment caused by the effect

10. *See, e.g., Monmouth Real Estate Investment Trust* v. *Manville Foodland*, App. No. 81-2947 (3d Cir. June 29, 1982); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292, 1296 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Melrose Realty Co.* v. *Loews, Inc.*, 234 F.2d 518, 519 (3d Cir.), *cert. denied*, 352 U.S. 890 (1956); *Harrison* v. *Paramount Pictures, Inc.*, 211 F.2d 405 (3d Cir. 1954), *aff'g per curiam*, 115 F. Supp. 312 (E.D. Pa. 1953), *cert. denied*, 348 U.S. 828 (1954); *Lieberthal* v. *North Country Lanes, Inc.*, 221 F. Supp. 685, 689-90 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 269 (2d Cir. 1964); *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 30 F. Supp. 389, 391 (S.D.N.Y. 1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940).

11. *See, e.g., Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 188-89 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

12. *See, e.g., SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166, 170 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

13. *See, e.g., Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 394-95 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

of an antitrust offense on the firm in which he has an interest.[14]

Thus, even if the alleged antitrust violation caused the claimed breach of contract and resulting injury to petitioner, which it unquestionably did not, the present action would present no novel question or important issue that warrants this Court's attention.[15] To the contrary, this action can and should be disposed of under a long line of uniform authority culminating with this Court's pronouncement in *Associated General Contractors.*[16] Peti-

14. *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Ash* v. *Int'l Business Machines, Inc.*, 353 F.2d 491, 493-94 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966).

15. Moreover, since petitioner offers no basis to distinguish its alleged injury from that of any other supplier of goods or services to Village, acceptance of petitioner's arguments could allow any person who may in some way do business with the alleged victim of an asserted antitrust violation to sue for treble damages. As the court stated in *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d at 1295, such a result would create a devastating distortion of the antitrust laws:

> "[I]f the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery . . . would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress."

See also Blue Shield, 102 S.Ct. at 2547-48.

16. The lower court decisions cited by petitioner do not in any way undercut the soundness of the dismissal of the Complaint herein. First, they do not deal at all with the finding below that petitioner's alleged injury was completely unrelated to the claimed antitrust violation. And, in any event, petitioner's citations are all fully distinguishable, particularly in light of the decision in *Associated General Contractors.*

Petitioner relies heavily upon *Ostrofe* v. *H.S. Crocker Company, Inc.*, 670 F.2d 1378 (9th Cir. 1982). Significantly, this Court has recently vacated the decision in *Ostrofe* and remanded to the Ninth Circuit for further consideration in light of its opinion in *Associated*

(footnote continued on next page)

tioner's state law claim may then be adjudicated in the proper forum—*viz.*, in the New Jersey courts, where petitioner's parallel action is pending.

B. The Judgment Below Applied Correct Standards in Holding That Petitioner Did Not Suffer "Antitrust Injury".

As this Court has made clear, a treble damage antitrust plaintiff must set forth some of facts which demonstrate that it has suffered "antitrust injury," *i.e.*, a sufficient

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General Contractors. H.S. Crocker Company, Inc. v. *Ostrofe*, Dkt. No. 82-174 (S.Ct. Feb. 28, 1983). In addition, unlike the purported injury of petitioner herein, Ostrofe's injury was not derivative from injuries suffered by others participating in a separate area of the economy; rather, he was directly injured by a discharge from employment aimed specifically at him. Furthermore, the number of employees in Ostrofe's situation is "not so numerous that recognizing their claims would threaten a flood of litigation." 670 F.2d at 1385. The same cannot be said for granting standing to those in a contractual or other business relationship with an alleged victim of an antitrust conspiracy. Finally, the court in *Ostrofe* noted that in many situations an employee so discharged would have no other avenue to seek a remedy. Here, of course, petitioner has the New Jersey state courts available to adjudge its pending breach of contract suit.

The other principal cases cited by petitioner are likewise readily distinguishable. In *Hoopes* v. *Union Oil Company of California*, 374 F.2d 480 (9th Cir. 1967), plaintiff was granted standing in its capacity as the operator of a gasoline station, not merely as a landlord/participant in the real estate market. And, in *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), and *Aurora Enterprises* v. *National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982), plaintiffs were directly injured, not merely "sideswiped [or] struck by a carom shot," as, at most, was petitioner herein. 433 F.2d at 1076.

Finally, the district court's decision on standing in *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 468 F. Supp. 154 (C.D. Cal. 1979), which was not reviewed by the Ninth Circuit, dealt solely with its test for standing to sue for injunctive relief under Section 16 of the Clayton Act (15 U.S.C. § 26). *Id.* at 158-59. However, petitioner's claim herein is one only for damages under Section 4 of the Clayton Act. As was recognized by the Third Circuit (P. App. A at 2a), petitioner abandoned its § 16 claim, dismissed by the district court, on appeal; certainly, petitioner may not revive that claim before this Court. *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950); *Helvering* v. *Wood*, 309 U.S. 344, 348-49 (1940).

"relationship [between] the injury alleged [and] those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful." *Blue Shield of Virginia* v. *McCready, supra,* 102 S.Ct. at 2548. *Accord, Associated General Contractors of California, Inc.* v. *California State Council of Carpenters, supra,* 51 U.S.L.W. at 4145.

This requirement was derived from the Court's earlier decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. at 487, in which the Court held that, while every commercial act or arrangement, "whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons," for plaintiffs to recover under the antitrust laws,

> "they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* at 489.

Petitioner's brief essentially ignores this aspect of the requirements for antitrust standing, and does so for good reason from petitioner's perspective. As the district court held, regardless of the interpretation of the Lease, petitioner's claimed injury flowed solely from the alleged breach of contract by its lessee, not from the alleged anticompetitive impact of the claimed conspiracy, *viz.,* to increase prices and reduce service "in the retail supermarket business." (P. App. B at 9a). Petitioner is thus in no better position

than the plaintiff in *Chrysler Corp.* v. *Fedders Corp., supra*, whose antitrust claim was dismissed for lack of "antitrust injury," despite its contention that the defendant breached its contract with plaintiff pursuant to an alleged conspiracy. 643 F.2d at 1234-35.[17]

Accordingly, the judgment below conforms to the decisions of this Court denying treble damage antitrust standing to persons who have not suffered "antitrust injury."

Conclusion

For the foregoing reasons, this action presents no significant federal question for this Court to address, and the Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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17. *See also Larry R. George Sales Co.* v. *Cool Attic Corp.*, 587 F.2d 266, 274-75 (5th Cir. 1979); *Blank* v. *Preventive Health Programs, Inc.*, 504 F. Supp. 416, 419-20 (S.D. Ga. 1980) ("while [plaintiff's] injuries may give rise to a breach of contract claim, such damages cannot be characterized as antitrust injuries remediable by a treble damages action.").

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